IN THE

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, TEXAS-ZINC MINERALS CORPORATION, INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A7) has not yet been reported. The decision of the National Labor Relations Board (JA 37-46) is reported at 126 N.L.R.B. 603.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. A8) was entered on March 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in view of the Treaty of 1868 with the Navajo Indian Tribe and that Tribe's recognized powers of self-government, the Labor Management Relations Act, 1947, as amended, authorizes the National Labor Relations Board to direct a representation election among the employees of a corporate lessee of the Navajo Indian Tribe, which, with the permission and consent of the Tribe, is doing business upon and within the Navajo Indian Reservation.

CONSTITUTIONAL PROVISION, TREATY, AND STATUTE INVOLVED

The Commerce Clause and the pertinent provisions of the Treaty of 1868 with the Navajo Indian Tribe and of the Labor Management Relations Act, 1947, as amended, are set forth in Appendix C, *infra*, pp. A9-A12.

STATEMENT

The Advisory Committee of the Navajo Tribe in 1958 studied the problem of labor relations on the Navajo Indian Reservation (JA 80-95), and found that, with minor exceptions, the individual members of the Tribe were illiterate, poorly educated, unable to speak or understand English with facility, and did not share American or European cultural traditions. On the basis of those facts, the Advisory Committee concluded (JA 91-92) that the members of the Navajo Tribe who constituted the working force on the Reservation, were incapable of determining for themselves—

"(a) The advantages and disadvantages of unionization.

"(b) The advantages and disadvantages of membership in a union.

"(c) How to vote upon, manage or regulate the ordinary business of a union.

"(d) Whether a particular contract, negotiated by the officers of a union or by a negotiating committee is a fair, reasonable and proper contract made with due regard to the welfare of the union or of the individual membership therein."

Acting on the Advisory Committee's report, the Navajo Tribal Council—the Tribe's governing body (JA 9-10)—adopted three resolutions on August 27, 1958.

The first of these (JA 20-22), adopted by a vote of 65 to 0, directed the preparation of a vocational training program and plans, and declared it to be

> "the policy of the Navajo Tribe to cooperate and collaborate with any unions desiring to participate, in similar training programs which they may maintain to the end that the classification of Navajo workers in a representative number of skills, crafts and trades becomes a reality before they become members of a union rather than to have them join unions first as common laborers and thereafter attempt to improve their classifications within the framework of the unions."

The second resolution (JA 22-23), adopted by a vote of 67 to 0, declared that

> "Permission and authority to solicit for memberships in or to conduct any other incidents or adjuncts of unionization activities on the Navajo Reservation or within the territory under the jurisdiction of this Council are denied and refused."

The final resolution (JA 24-28), adopted by a vote of 62 to 0 with 2 abstentions, established a Tribal

Labor Policy that discouraged unionization in numerous particulars, viz.: prohibition against solicitation for memberships in or conducting any other incident or adjunct of unionization activities in the Navajo country; a "right to work" declaration; prohibition of threatened or actual interference with a person, his family or property, to coerce him to join or withdraw from a labor organization, to strike, or to leave employment; prohibition of illegal strikes and lockouts; and prohibition of compulsory payment of dues to labor organizations as a condition of employment or continuation of employment. Future agreements involving violation of the resolution were declared to be illegal (Secs. 4, 8; JA 25-26, 27), and provision was made for injunctive relief and damages in the event of violations (Sec. 7, JA 26-27). Obedience to the resolution was required as a condition of all future mineral leases, with provision for forfeiture in the event of breach (Sec. 12, JA 28). The following penalties were provided (Sec. 11, JA 28):

Any Indian violator was to be subject, upon conviction, "to labor for a period of not to exceed 30 days," any non-Indian violator to exclusion from Navajo Tribal land in accordance with existing procedures.

Earlier, on July 25, 1956, the Navajo Tribe had leased to Texas-Zinc Minerals Corporation (hereinafter "Texas-Zinc") for 25 years a tract of land within the Reservation at Mexican Hat, San Juan County, Utah (JA 32-36), on which that company now operates a uranium concentrate mill, from which it annually ships materials in excess of $5,000,000 in value to the Atomic Energy Commission's receiving station in Colorado. About 87 persons, of whom 47 are members of the Navajo Tribe and 40 are non-Indians, are employed at the mill. (Fdg. 1, JA 108.)

On May 12, 1959, the United Steelworkers of America, AFL-CIO (hereinafter "Steelworkers") filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act (29 U.S.C. § 159(c)) requesting that an election be held to determine whether Texas-Zinc's employees wished to be represented by it for collective bargaining purposes. (Fdg. 2, JA 108.)

At the representation hearing before the Board, the Navajo Tribe intervened specially for the purpose of contesting the Board's jurisdiction in the proceeding. Texas-Zinc, the Steelworkers, and two other intervening unions—International Hod Carriers', Building and Common Laborers' Union of America, and International Union of Operating Engineers, AFL-CIO—participated in the hearing. (Fdg. 3, JA 108-109.)

On February 11, 1960, the Board by a vote of 3-2 issued its Decision and Direction of Election, in which it determined that it had jurisdiction to administer the provisions of the National Labor Relations Act in respect of interstate businesses located on the Navajo Indian Reservation, and directed that a representation election be held as requested by the Steelworkers' petition (JA 37-46; 126 N.L.R.B. 603; Fdg. 4, JA 109). Two Members of the Board dissented "because in our view the National Labor Relations Board does not have jurisdiction over the Employer in this case" (JA 46).

Thereupon, on March 23, 1960, the Navajo Tribe brought the present action to enjoin the Board from conducting a representation hearing (JA 3-28), joining as defendants the Members of the Board and the three interested unions.

The gravamen of the complaint was that the Board lacked jurisdiction because the Navajo Tribe has plenary authority with respect to the members of its Tribe and as to all activity conducted on the reservation, except to the extent that such authority has been expressly limited by the United States; that pursuant to its powers of self-government, the Tribe through its governing body, the Tribal Council, has enacted resolutions forbidding all unionization activities on its reservation; that the National Labor Relations Act was not intended to apply to business activities carried on within the boundaries of an Indian reservation; and that the power to exclude union solicitors derives from so much of Article II of the Treaty of 1868 with the Tribe as provides (15 Stat. 667 at 668) that

> "* * * the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

Texas-Zinc, the employer, was on motion permitted to intervene (JA 29-30, 99); its complaint sought an injunction against the holding of the election until determination of the present case (JA 99-103).

The Board and all three unions filed motions to dismiss and or for summary judgment (JA 31-74, 75-80, 95-98, 103-104), after which those motions, together with the Tribe's motion for a preliminary injunction, came on for hearing (Fdg. 8, JA 110).

The District Court (Youngdahl, D. J.) held that the operations of Texas-Zinc affected interstate commerce within the meaning of the National Labor Relations Act, and that the Board was accordingly authorized to entertain the complaint for a representation election among the employees of Texas-Zinc (Conc. 1, 2, JA 110). Accordingly, on the footing that the Navajo Tribe and the intervenor failed to state claims warranting relief, the District Court dismissed their complaints (JA 111).

On appeal (JA 111-112), the court below affirmed. Reading the Act literally, the District of Columbia Circuit held that it applied to Texas-Zinc because that company was engaged in the production of goods for interstate commerce, and that the Congressional labor policy embraced in the Act superseded the local labor policy of States and Indian tribes.

REASONS FOR GRANTING THE WRIT

Here, as in other recent cases (*Squire* v. *Capoeman*, 351 U.S. 1; *Williams* v. *Lee*, 358 U.S. 217; *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U.S. 99), there is presented a substantial and significant question involving the impact of State or Federal legislation upon the quasi-sovereignty of Indian tribes, in this instance the most numerous of any in the United States, having some 85,000 members, and living on a Reservation that is as large as the entire State of West Virginia.

The record establishes that the overwhelming number of Navajos are illiterate, poorly educated, unable to speak or understand English with facility, and hence incapable of determining for themselves the advantages and disadvantages of unionization, how to vote

upon or manage the ordinary business of a union, or whether a particular union contract duly negotiated is fair, reasonable, or proper. The question is whether Congress intended, or could have intended, to subject such an Indian tribe to the bombardment of union importunities that are a necessary and recognized accompaniment of the labor movement under the National Labor Relations Act and successor legislation.

We submit that the decision below, which answers that question in the affirmative, disregards hitherto settled standards for the interpretation of legislation affecting Indians, and that the court below accordingly has violated the Navajo Tribe's solemn compact with the United States.

First. The court below held (*infra*, page A6) that "the Act clearly applies to the Texas-Zinc Minerals Corporation, the employer-intervenor, because it is engaged in the production of goods for interstate commerce, and labor disputes in its plant would clearly 'affect commerce' within the meaning of the Act." Therefore, said the court below, the circumstance that the employer's plant is located on the reservation cannot remove it or its employees, Indians or otherwise, from the coverage of the Act; and the Congressional labor policy supersedes local policies of the States and the Indian Tribes in all cases to which the Act applies.

We submit that the Court of Appeals' literal reading of the National Labor Relations Act not only is not decisive of the real issue here but actually obscures it.

Starting with that reading, it is at once apparent that the Act is in conflict, not so much with the Navajo Tribe's labor policy as such, as with the Tribe's leg-

islative exclusion of union solicitors (JA 23; 24-25), enactments that are squarely bottomed on its Treaty of 1868 with the United States. If the Labor Act applies, then the Treaty has been unilaterally modified by Congress, in derogation of the Indians' earlier rights, for the Tribe would then be limited in its right to exclude outsiders. Contrariwise, if the Treaty prevails according to its terms, then the Tribe's power to exclude union solicitors is absolute, and, since solicitation of union membership is obviously protected under the Act, it follows that the Act must be inapplicable within the Reservation.

Second. The resolution of that conflict between the Treaty and the Act involves, not any question of power, because Congress has undoubted *power* to annul or abrogate or modify Indian treaties and to turn them into "white men's promises" (e.g., *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553), but one of construction. Petitioners submit that, under two hitherto settled rules, the conclusion properly to be reached is that the Treaty prevails.

(1) "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99-100, and cases there cited. And, as *Squire* v. *Capoeman*, 351 U.S. 1, teaches, this rule is particularly applicable whenever there is apparent conflict between the broad terms of a general statute and the specific provisions of an Indian treaty.

(2) Indian treaties are never to be construed to the prejudice of Indians; rather, "enlarged rules of construction are adopted" (*The Kansas Indians*, 5 Wall. 737, 760), "in a spirit which generously recognizes the

full obligation of this nation to protect the interests of a dependent people" (*Tulee* v. *Washington*, 315 U.S. 681, 684-685), and "in the sense in which they would naturally be understood by the Indians" (*Jones* v. *Meehan*, 175 U.S. 1, 11). This principle, this approach, this standard of textual interpretation, has been repeated and reiterated in many differing contexts, particularly in recent years. *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116, 117; *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297; *Squire* v. *Capoeman*, 351 U.S. 1, 6-7.

Since, in the present case, Congress plainly did not have Indian treaty rights in contemplation, either when it enacted the National Labor Relations Act in 1935 or when it passed the Labor Management Relations Act in 1947; since the exercise of the rights under those measures is necessarily in conflict with the Navajo Tribe's right to exclude outsiders under its Treaty of 1868 with the United States; we submit it follows that, under the rules of construction just set out, the Tribe's treaty rights must prevail.

Third. The foregoing analysis is not contrary to the holding in *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U.S. 99. There Congress not only had Indians in contemplation—indeed, the case turned on the meaning of "Indian reservations" in Sec. 3(2) of the Federal Power Act, 16 U.S.C. § 796(2)—but the Court specifically held that that Act as interpreted did not violate any treaty. See 362 U.S. at 124.

Similarly, *Superintendent* v. *Commissioner*, 295 U.S. 418, does not foreclose the Navajo Tribe here, for at least two reasons. First, in that case only the taxation of individual Indians was involved, whereas here it is the very sovereignty of the Navajo Tribe and the terms

of the Treaty of 1868 that stand to be impaired. Second, *Superintendent* v. *Commissioner* hardly supports the proposition that all general statutes invariably include and are applicable to Indians, as indeed *Squire* v. *Capoeman*, 351 U.S. 1, with its holding that interest from the sale of timber on allotted land was not subject to the capital gains tax, dramatically demonstrates. See also *Landman* v. *United States*, 109 C. Cls. 1, certiorari denied, 332 U.S. 815, holding that a restricted Indian's allotment could not be included in his gross estate for purposes of the Federal estate tax.

Fourth. Only a little more than two years ago, this Court said of the Navajos' Treaty with the United States (*Williams* v. *Lee*, 358 U.S. 217, 221-222, 223):

> "Implicit in these treaty terms * * * was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.
>
> * * * * *
>
> "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."

We submit that the holding below, to the effect that the general terms of a labor management enactment are to be construed to curtail the Navajos' treaty rights to exclude outsiders from their Reservation, so far runs counter to hitherto settled doctrines, and so seriously threatens to disrupt the tribal life of an untutored and dependent people as yet unprepared to cope with the incidents of industralization, as to require review—and rectification—by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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